

UNITED STATES OF AMERICA

V.

SALIM AHMED HAMDAN

**DEFENSE MOTION TO  
DISMISS**

(FOR FAILURE TO STATE  
AN OFFENSE WITHIN  
THE SUBJECT-MATTER  
JURISDICTION OF A  
MILITARY COMMISSION  
AND CONTRARY TO THE  
RECOGNIZED LAWS OF  
WAR)

1 October 2004

1. Timeliness. This motion is submitted within the time frame established by the Presiding Officer's order during the initial session of Military Commissions on 24 August 2004.

2. Relief Sought. That the Military Commission find that the sole charge against Mr. Hamdan is not within its subject matter jurisdiction as established by the Constitution of the United States, Federal Statutes, and international law and dismiss the charge against Mr. Hamdan.

3. Overview. Mr. Hamdan has been charged with a single count of conspiracy. This charge is clearly authorized. As the Supreme Court of the United States has said, only offenses against the laws of war can be tried by a military commission. When it examined the case of the Nazi Saboteurs, the Supreme Court said that the very first inquiry a court must ask is “whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial.” *Ex Parte Quirin*, 317 U.S 1, 29 (1942). Here, the only charge against Mr. Hamdan is one unrecognized by the United States Congress and unknown to the laws of war.

- #### 4. Facts.

- a. On September 11, 2001, Mohammed Atta, Abdul Alomari, Wail al-Shehri, Waleed al-Shehri, and Satam al-Suqami hijacked American Airlines Flight 11, bound from Boston to Los Angeles, and crashed it into the North Tower of the World Trade Center in New York. Mohammed Atta piloted the plane after it was hijacked. Near-simultaneously, Marwan al-Shehhi, Fayez Ahmed, a/k/a Banihammad Fayez, Ahmed al-Ghamdi, Hamza al-Ghamdi, and Mohald al-Shehri hijacked United Airlines Flight 175, bound from Boston to Los Angeles, and crashed it into the South Tower of the World Trade Center in New York. Marwan al-Shehhi piloted the plane after it was hijacked. As a result of the crashes, the towers of the World Trade Center collapsed. Approximately 2,752 people, almost all of them civilians, were killed. At the time of the hijackings and

attacks, the tenants of the World Trade Center were civilian in nature. The occupants consisted of approximately 430 tenants for business and commerce purposes only. Each of the named individuals are alleged to be members of Al Qaeda.

b. On September 11, 2001, Khalid al-Midhar, Nawaf al-Hazmi, Hani Hanjour, Salem al-Hamzi, and Majed Moqed hijacked American Airlines Flight 77, bound from Washington D.C. to Los Angeles, and crashed it into the Pentagon in Arlington, Virginia. Hani Hanjour piloted the plane after it was hijacked. As a result of the crash, approximately 184 people including many civilians were killed in and around the Pentagon. Each of the named individuals are alleged to be members of Al Qaeda.

c. On September 11, 2002, Ziad Jarrah, Ahmed al-Haznawi, Saaed al-Ghamdi, and Ahmed al-Nami hijacked United Airlines Flight 93, bound from Newark to San Francisco, and crashed it into a field near Shanksville, Pennsylvania. Ziad Jarrah piloted the plane after it was hijacked. 44 civilians died in the crash. Each of the named individuals are alleged to be members of Al Qaeda.

d. The organization known as al Qaida, or "The Base," was founded in or around 1989 by Usama bin Laden, and others. Al Qaida is composed of private individuals and did not constitute the armed force of any recognized state.

e. In response to the events of September 11, 2001, on September 18, 2001, Congress passed a joint resolution authorizing the President to use all necessary and appropriate force . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Sept. 18, 2001 Joint Res.

f. On 7 October 2001, pursuant to Presidential Order the United States commenced armed hostilities in Afghanistan in support of the Northern Alliance.

g. At the time that the United States commenced armed hostilities the Northern Alliance consisted of ethnic Tajiks that opposed the Taliban regime by military force. The Northern Alliance controlled approximately 10% of Afghanistan. The remainder of Afghanistan was controlled by military force/government, commonly referred to as the Taliban.

h. The Taliban exercised political and military control over that portion of Afghanistan that it controlled. The Taliban had been recognized as the government of Afghanistan by Pakistan and Saudi Arabia. The United States, however, did not recognize the Taliban as government of Afghanistan.

i. The United States, however, prior to the commencement of the use of military force negotiated with the Taliban seeking that they capture and turn over Usama Bin Laden and other members of al Qaeda to the United States.

j. On 13 November 2001, President Bush issued a military order pursuant to the authority vested in him as President of the United States and Commander in Chief of the Armed Forces of the United States by the Constitution and laws of the United States vesting in the Secretary of Defense the authority to try by military commission those persons that the President determined were subject to the order.

k. Subsequent to the President's Military Order of 13 November 2001, Mr. Hamdan was taken XXXX in late November 2001, XXXX and has been detained by the United States government ever since.

l. On 3 July 2003, the President of the United States determined that Mr. Hamdan was subject to his military order of 13 November 2001.

m. 13 July 2004, a charge of conspiracy to commit terrorism against Mr. Hamdan was referred to this Military Commission.

## 5. Law.

### a. This Commission must First Satisfy Itself That Jurisdiction Exists Before Proceeding

The Supreme Court of the United States has explained what jurisdiction is and what this body's duties are: "The requirement that jurisdiction be established as a **threshold** matter ... is **inflexible** and without exception . . . for [j]urisdiction is **power** to declare the law,, and [w]ithout **jurisdiction the court cannot proceed at all** in any cause." *Ruhrgas AG v. Marathon Oil Co.*, 119 S. Ct. 1563, 1567 (1999) (internal punctuation and citations omitted).

"Jurisdiction" refers to the power of a legal body to try an offense. If that body lacks jurisdiction, everything it does in proceeding with a trial is illegal and unlawful. That is why judges across our land, in both the military and civil systems, have said that before proceeding with trial, they must first satisfy themselves that jurisdiction exists. *See In re Grimley*, 137 U.S. 147, 150 (1890); *Carter v. McClaghry*, 183 U.S. 365, 401 (1902); *Hiatt v. Brown*, 339 U.S. 103, 111 (1950). Jurisdiction, in turn, has always been broken down into two separate concepts. *First*, is the offense something that can be tried by the legal body? This inquiry turns on the history and language of authorizing legislation for that legal body. *Second*, is the person being tried someone that is properly before the reach of the legal body? That question asks whether the Government has alleged facts sufficient to place the specified individual before the military commission. This motion concerns the first of these inquiries. Because conspiracy is not an offense against the laws of war, this commission should declare the prosecution of Mr. Hamdan null and void.

### b. Commissions Can Currently Try Only Spying and Enemy Assistance

Congress has provided only two offenses explicitly triable by commission. *See* 10 U.S.C. § 904 (aiding the enemy); 10 U.S.C. § 906 (spying). Yet rather than charge Mr. Hamdan with these carefully crafted statutes, the Government has invented a definition of an offense that is unknown to the laws of war and untethered to anything in the U.S. Code. Amending the definition of offenses is a job belonging to Congress – one it has proven capable of executing – as the events after *Quirin* demonstrated.<sup>1</sup>

c. Even in Declared War, Commissions May Only Try Offenses Specified By Congress

With respect to what constitutes a violation of the law of war, “Congress ha[s] the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts.” *Quirin*, 317 U.S., at 30. At the time of *Quirin*, Congress chose not to define offenses against the law of war. But since those events, the Congress of the United States has done exactly that in the War Crimes Act of 1996, 18 U.S.C. § 2441, and the Expanded War Crimes Act of 1997. These Acts established that a “war crime” consists of “any conduct” that, *inter alia*, is a “grave breach” of international law. Congress provided a huge list of crimes in referencing so many treaties, but conspiracy is not on it.<sup>2</sup> A lawful commission may hear cases involving poison, killing soldiers who have laid down their arms, and like offenses specified in The Hague Convention and elsewhere, but not conspiracy.

d. The Conspiracy Charge Does Not State a Violation of the Laws of War

1. *The laws of war do not recognize a conspiracy offense.*

Neither Article 23 of The Hague Convention IV nor the Geneva Conventions make any mention whatsoever of a conspiracy charge.<sup>3</sup> While a conspiracy charge was used at

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<sup>1</sup> Following *Quirin*, Congress expanded the reach of Section 906 to make clear that it covered precisely the offenses of the Nazi saboteurs. 10 U.S.C. § 906 (1951) added to the definition of spying not only military installations but also spying over “any manufacturing or industrial plant.” *See* Charge 1, Specification 1, in *Quirin* Tr., at 36 (charging them with intent “to destroy certain war industries, war utilities and war materials within the United States.”). This was intentional. *See* Hearings on HR 2498 of the 81st Cong. at 1229 (1949) (stating that Article 106 was intentionally expanded “in view of the importance of industrial plants, and other manufacturing units engaged in the war effort”). The UCMJ drafters also enlarged the definition of Article 81 to encompass more tangential connections through punishing anyone who “holds any intercourse with the enemy.” This, too, was intentional. *See id.*

<sup>2</sup> Indeed, the House Report for that legislation referred explicitly to Congress’ Art. I, Section 8 power to “define and punish . . . Offenses against the law of Nations” and stated that “The constitutional authority to enact federal laws relating to the commission of war crimes is undoubtedly the same as the authority to create military commissions to prosecute perpetrators of these crimes.” H.R. Rep. No. 105-204.

<sup>3</sup> Indeed, they *bar* collective punishment like that sought by the Government here. *See* Art. 87 of GPW III; *see also* Art. 33, GPW IV.

Nuremberg, that offense is unavailable today.<sup>4</sup> The Nuremberg judges ruled that there was no offense of conspiracy to commit war crimes or crimes against humanity.<sup>5</sup> Instead, they confined conspiracy to very limited acts, and only against very high-level German officials who were directly involved in specific acts of aggression that took place.<sup>6</sup> Indeed, the Department of Defense has essentially admitted that conspiracy is not a violation of the laws of war. Its own Instruction defining the offense divides all offenses into three distinct groups: War Crimes; Other Offenses Triable by Military Commission; and Other Forms of Liability and related Offenses.<sup>7</sup> Conspiracy falls within not “War Crimes,” and not even “Other Offenses Triable by Military Commission,” but rather in the “Other Forms Of Liability” section.

When leaders act through followers, the leaders may be liable under complicity principles for limited offenses that have actually taken place. But there is literally no support in the law of war for the idea that a low-level individual may be liable simply because he “agrees” to commit some act in the future. The weight of law throughout the world emphatically rejects such a notion. Conspiracy has *never* been used to prosecute an inchoate offense of the law of war. See Cassese, International Criminal Law 197 (Oxford 2003).

“The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals.” *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.). And the Department of Defense admits that “No offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question.” Military Commission Instruction (“MCI”) No. 2, Section 3(A).

## *2. Conspiracy doctrine cannot be used against low-level individuals.*

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<sup>4</sup> Assistant Attorney General Herbert Wechsler, head of the Criminal Division, criticized the War Department’s proposal to use a conspiracy charge, stating that “it is an error to designate as conspiracy the crime itself, the more so since the common-law conception of the criminality of an unexecuted plan is not universally accepted in civilized law.” See Memorandum for the Attorney General, in The American Road to Nuremberg, 84, 87, Dec. 29, 1944 (Smith ed. 1982).

<sup>5</sup> Many read Nuremberg to say that there is no separate offense of conspiracy at all. See Major Edward J. O’Brien, The Nuremberg Principles, Command Responsibility, and the Defense of Captain Rockwood, 149 Mil. L. Rev. 275, 281 (1995).

<sup>6</sup> “The International Military Tribunal ultimately “interpreted the [conspiracy] concept very narrowly, and adopted a construction of the Charter under which conspiracies to commit ‘war crimes’ or ‘crimes against humanity’ were ruled entirely outside the jurisdiction of the Tribunal.” Telford Taylor, Brigadier General, USA, Chief of Counsel for War Crimes, Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10., 70 (U.S.G.P.O. 15 Aug. 1949). In fact, all four of the cases brought against defendants for conspiracy to commit crimes against the peace resulted in acquittals. *Id.* at 31.

<sup>7</sup> See MCI No. 2; see also 1998 Rome Statute of the International Criminal Court, art. 8(a)(2), UN Doc. A/CONF. 183/9 (1998), reprinted in 37 ILM 999 (1998) (defining “War Crimes” as grave breaches of the 1949 Geneva Conventions and “other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law. . .”), *Id.*

The Government's charging Hamdan, a mere underling, with conspiracy is in complete contrast to international law, which has emphasized that any conspiracy charges must be against leaders.<sup>8</sup> The charges against Mr. Hamdan are unprecedented and could potentially destabilize the development of international criminal law. See Neal Katyal, *Gitmo Better Blues*, *Slate Magazine*, Mar. 19, 2004, available at <http://slate.msn.com/id/2097397>.

3. *Conspiracy charges cannot incorporate pre-war conduct.*

The conspiracy charge is based largely on conduct that occurred before 9/11, yet commissions can only adjudicate violations after a war begins.<sup>9</sup> It is a tremendous stretch to argue that the war began in 1989 or 1995 or 1999. Such a claim would have surprised former President Clinton; indeed, it apparently would even have surprised President Bush, who stated at a March 6, 2004 press conference, "The terrorists declared war on us that day [September 11, 2001]."

4. *The Pentagon definition empties conspiracy of its meaning.*

The Government's "definition" of conspiracy (a questionable term to apply to a Pentagon civilian's laundry list of offenses when the Government simultaneously says that it is a "common law" offense) is woefully lacking. For example, it eliminates the most important element of conspiracy: agreement. See, *Prosecutor v. Juvenal Kajelijeli* (Case No. ICTR-98-44A) Judgment 787 (1 Dec. 2003) ("the evidence must show that an

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<sup>8</sup> See Nuremberg Trial Proceedings, reprinted in *The Avalon Project at Yale Law School*, vol. 22, 467: Judgment, <http://www.yale.edu/lawweb/avalon/imt/proc/09-30-46.htm>; *Charter of the International Military Tribunal for the Far East*, art. 1 (January 19, 1946), <http://www.yale.edu/lawweb/avalon/imtfech.htm> (limiting conspiracy charge to leaders); S.C. Res. 1329 (Nov. 30, 2000) (detailing the Security Counsel's endorsement of an official prosecutorial policy for the ICTY and ICTR that "civilian, military and paramilitary leaders should be tried before them in preference to minor actors."); Statute of the Special Court for Sierra Leone, art. 1 (limiting the court's jurisdiction to those "who bear the *greatest responsibility* for serious violations of international humanitarian law."); Wechsler Memorandum, *supra*, at 89 (criticizing conspiracy charges against Germans who were not "prime leaders," because the charge "may be seriously weakened in the eyes of the world if too many individuals are included in it.").

<sup>9</sup> GPW Art. 99 (explicitly barring such ex post facto charges); see also, International Covenant on Civil and Political Rights (ICCPR), Article 15 (made non-derogable by Article 4); Wechsler Memo., *supra*, at 86 ("atrocities committed prior to a state of war" "are not embraced within the ordinary concept of crimes punishable as violations of the laws of war."); *Prosecutor v. Multinovic*, Decision on Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise, ICTY Appeals Chamber, Case No. IT-99-37-AR72, ¶ 17 (May 21, 2003) ("it is every Chamber's duty to ascertain that a crime or a form of liability charged in the indictment is both provided for under the statute and existed at the relevant time under customary international law."); Winthrop, *Military Law and Precedents* 837 (2d ed. 1920) ("An offence, to be brought within the cognizance of a military commission, must have been committed within the period of the war"); *id.* n.95 (quoting source that "martial law is not retrospective. An offender cannot be tried for a crime committed before martial law was proclaimed.").

agreement had indeed been reached. The mere showing of a negotiation in process will not do.”). Under MCI No. 2, § 6(a)(1), a defendant need only “join[] an enterprise of persons who shared a common criminal purpose” to establish a conspiracy. While those who actively plot specific terrorist activities would fall within the domestic civilian conspiracy offense,<sup>10</sup> the MCI’s use of “enterprise” is impermissibly vague.

Second, even under broad domestic standards, conspiracy is a specific intent crime. *State v. Bond*, 49 Conn. App. 183, 196, 713 A.2d 906, 913 (Conn. App. Ct. 1998). As such, the intent of one person to commit a crime cannot simply be imputed to another. *See Clark v. Louisiana State Penitentiary*, 694 F.2d 75 (5th Cir. 1982), *rehearing denied with opinion*, 697 F.2d 699 (5<sup>th</sup> Cir. 1983). Yet the prosecution does not allege such specific intent.

#### e) Summary

Given the above deficiencies, a conspiracy charge cannot be based upon the MCI’s invented definition of the offense. “Common law” does not mean “made-up law,” especially when someone’s liberty is at stake.

No one understands better the need for clearly defined offenses that let the world know that the United States is serious about prosecuting terrorism than undersigned counsel. Fortunately, the United States Congress has proven itself willing to do exactly that, listing dozens of crimes that can be used to prosecute terrorists, both in civilian courts as well as courts martial. This prosecution is an unbridled attempt to circumvent a carefully calibrated plan for dealing with threats to the nation. Even if it might be wise to have military commissions for certain offenses, it is manifestly unwise to do so here, for a crime that has *never* been accepted in a military commission before. Military commissions can only try violations of the laws of war. The charge against Mr. Hamdan, however, states something unknown to those very laws.

6. Files Attached. None.

7. Oral Argument. Is required. The Presiding Officer has instructed the Commission members that he will provide the Commission members with his interpretation of the law as he sees it, but that the Commission members are free to arrive at their own conclusions. The Defense asserts its right to be heard following the Presiding Officer’s pronouncement via oral argument in order for the remainder of the Commission members to be informed as to the reasons for the Defense’s support or opposition to the Presiding

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<sup>10</sup> Domestic criminal law is, of course, not a powerful source of support for the Government. American civilian criminal law has been able to develop a vibrant offense of conspiracy because of its strong commitment to criminal procedural guarantees. While charges can be more vague in a civilian conspiracy trial and hearsay evidence may be admitted, the standard checks on prosecutorial and judicial abuse exist – an indictment by a grand jury, the right to a jury trial, the right to confront witnesses, the right to obtain exculpatory evidence, and so on. These procedural rights are preconditions before conspiracy doctrines become available.

Officer's position. Additionally, the Defense intends to call expert witnesses and to incorporate their testimony into this motion via oral argument.

8. List of Legal Authority Cited.

- a. *Clark v. Louisiana State Penitentiary*, 694 F.2d 75 (5th Cir. 1982)
- b. *Ex Parte Quirin*, 317 U.S 1, 29 (1942)
- c. *In re Grimley*, 137 U.S. 147, 150 (1890)
- d. *Carter v. McClaughry*, 183 U.S. 365, 401 (1902)
- e. *Hiatt v. Brown*, 339 U.S. 103, 111 (1950)
- f. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820)
- g. *Ruhrgas AG v. Marathon Oil Co.*, 119 S. Ct. 1563, 1567 (1999)
- h. 10 U.S.C. § 904
- i. 10 U.S.C. § 906
- j. 18 U.S.C. § 2441
- k. H.R. Rep. No. 105-204
- l. Hearings on HR 2498 of the 81st Cong. at 1229 (1949)
- m. *Charter of the International Military Tribunal for the Far East*, art. 1 (January 19, 1946), <http://www.yale.edu/lawweb/avalon/imtfech.htm>
- n. Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316 (1955) ("GPW")
- o. The Hague Convention IV (1907)
- p. 1998 Rome Statute of the International Criminal Court, art. 8(a)(2), UN Doc. A/CONF. 183/9 (1998), reprinted in 37 ILM 999 1998)
- q. Cassese, International Criminal Law 197 (Oxford 2003).
- r. Neal Katyal, Gitmo Better Blues, Slate Magazine, Mar. 19, 2004, available at <http://slate.msn.com/id/2097397>.



- s. Memorandum for the Attorney General, in The American Road to Nuremburg 84, 87, Dec. 29, 1944 (Smith ed. 1982)
- t. Military Commission Instruction ("MCI") No. 2
- u. Nuremberg Trial Proceedings, *reprinted in* The Avalon Project at Yale Law School, vol. 22, 467: Judgment, <http://www.yale.edu/lawweb/avalon/imt/proc/09-30-46.htm>
- v. Edward J. O'Brien, The Nuremberg Principles, Command Responsibility, and the Defense of Captain Rockwood, 149 Mil. L. Rev. 275, 281 (1995)
- w. *Prosecutor v. Multinovic*, Decision on Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise, ICTY Appeals Chamber, Case No. IT-99-37-AR72, ¶ 17 (May 21, 2003)
- x. *Prosecutor v. Juvenal Kajelijeli* (Case No. ICTR-98-44A) Judgment 787 (1 Dec. 2003)
- y. *State v. Bond*, 49 Conn. App. 183, 196, 713 A.2d 906, 913 (Conn. App. Ct. 1998)
- z. S.C. Res. 1329 (Nov. 30, 2000)
- aa. Statute of the Special Court for Sierra Leone, art. 1
- bb. Telford Taylor, Brigadier General, USA, Chief of Counsel for War Crimes, Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10., 70 (U.S.G.P.O. 15 Aug. 1949)
- cc. Winthrop, *Military Law and Precedents* (2d ed. 1920)

9. Witnesses and/or Evidence Required. The Defense intends to call Professor XXXX or Professor XXXX (Curriculum Vitae attached) as an expert witness in the area of International Criminal Law including crimes against the laws of war. Professors XXXX's and XXXX's expert testimony is probative to a reasonable person under the circumstances presented specifically, based on the Professors' skill knowledge, training and education. They possess specialized knowledge of International Criminal Law including crimes against the laws of war. The application and substance of such laws is a legal finding to be made by members of the Military Commission beyond the training and expertise of lay persons. As such, Professors XXXX and XXXX's specialized knowledge will assist the Commission members in understanding and determining whether the crime charged was a recognized violation of the laws of war during the relevant period.

10. Additional Information. Professors XXXX and XXXX are both nominated as experts as the Defense is yet to determine the availability of Professor XXXX. The Defense will not present cumulative testimony.

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